No. 80-1230

In the Supreme Court of the United States

OCTOBER TERM, 1980

ESTATE OF O.W. NEWMAN, JR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners seek review of the decision of the court of appeals in this federal estate tax case holding that disclaimers executed by the decedent's heirs which were invalid under state law did not increase the amount passing to the decedent's widow that would be eligible for the estate tax marital deduction. At the time of decedent's death in 1973, Section 2056 of the Internal Revenue Code (26 U.S.C. (1970 ed.)) provided a deduction in computing the federal estate tax equal to the value of the nonterminable property interests passing from the decedent to his spouse, up to a maximum of 50% of the value of the adjusted gross estate. Section 2056(d)(2) provided that property passing to another beneficiary could be treated as passing to the surviving spouse, so as to qualify for the marital deduction, if a disclaimer were made by the other beneficiary prior to the

due date for the filing of the estate tax return and acceptance of the legacy.[1] It has consistently been held, however, that to be effective for estate tax purposes, the disclaimer has to satisfy all of the requirements of state law. See *Estate of Hoenig* v. *Commissioner*, 66 T.C. 471, 475 (1976); *Estate of Mackie* v. *Commissioner*, 64 T.C. 308, 313 (1975); *Parker* v. *Commissioner*, 62 T.C. 192, 197, 198-199 (1974); *Estate of Caswell* v. *Commissioner*, 62 T.C. 51, 55-57 (1974). These holdings are consistent with the legislative history of Section 2056(d)(2) (S. Rep. No. 1599, 89th Cong., 2d Sess. 5 (1966)), and the provisions of the gift tax regulations (Treasury Regulations on Gift Tax, Section 25.2511-1(c) (26 C.F.R.)) pertaining to disclaimers.

Here, the decedent, Oscar W. Newman, Jr. died on June 29, 1973, and his will was probated in the appropriate Georgia court on August 6, 1973. In Item Three of his will, he bequeathed a note payable to himself in the amount of $256,980 to his wife, three children, and stepson in equal shares. In Item Four, he bequeathed the residue of his estate to his wife. On March 27, 1974, two of his children and his stepson each executed documents purporting to disclaim the legacies passing to them, which were filed with the probate court on March 28, 1974. These disclaimers were invalid under Georgia law, however, because they were not filed within six months of the decedent's death or within six months after identification of the recipient of the disclaimed property. On the federal estate tax return which was filed on

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[1]The Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, effective Jan. 1, 1977, added Section 2518 to the Internal Revenue Code to provide a uniform set of rules pertaining to disclaimers for both estate and gift tax purposes. The legislative history of Section 2518 makes it clear that if the requirements of Section 2518 are satisfied, Congress intended that a disclaimer would be given effect for federal purposes. See Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, (1976-3 Cum. Bull. (Vol. 2) 1, 601-604.

or before its due date of March 29, 1974, the estate nevertheless treated the disclaimers as valid in its computation of the marital deduction. In sustaining the estate tax deficiency determined by the Commissioner, both the Tax Court and the court of appeals determined that the disclaimers were not effective for purposes of increasing the marital deduction because they were invalid under Georgia law because they were not filed within the specified time limits (Pet. App. A-2 to A-3, A-6 to A-9, C-6 to C-8).

The decision below correctly held that the disclaimers did not increase the marital deduction. Petitioners contend (Pet. 5-6) that because the disclaimers were filed within the time limits specified in Section 2056(d)(2), *i.e.*, before the due date of the estate tax return, they were valid for estate tax purposes. In their view (Pet. 6), timeliness is a "procedural "matter" exclusively controlled by federal law, citing *Keinath* v. *Commissioner*, 480 F. 2d 57 (8th Cir. 1973), for the proposition that when time requirements under federal law, and requirements, other than time, under state law are satisfied, the disclaimer is sufficiently valid under both to be effective for federal estate tax purposes (Pet. 5-6).

Keinath does not support petitioners' claim. In that gift tax case, the taxpayer's father had provided his widow with a life estate in a testamentary trust, and had made the remainder interest partially payable to taxpayer, or, in the event of the taxpayer's death before the widow's, to his grandchildren. The taxpayer disclaimed his interest within a short time after his mother's death, but 19 years after his father's death. The disclaimer satisfied all Minnesota law requirements, including that of timeliness (480 F. 2d at 59-60). Federal gift tax regulations provided that, in order not to be a gift for gift tax purposes, the disclaimer had to be made within a reasonable period of time after knowledge of the existence of the transfer. Treasury Regulations on Gift Tax, Section 25.2511-1(c) (26 C.F.R.). The question was

whether the transfer that started the running of the "reasonable period" occurred at the father's death, or at the complete vesting of the taxpayer's interest on his mother's death. The court held that under state law a reasonable time was generally viewed as running from the vesting of contingent interests, and that the disclaimer did not constitute a gift. Accord: *Cottrel* v. *Commissioner*, 628 F. 2d 1127 (8th Cir. 1980); contra: *Jewett* v. *Commissioner*, 80-2 U.S.T.C. para. 13,384 (9th Cir. Dec. 9, 1980).

Whatever the merits of the decision in *Keinath*, it is clear that the court there assumed, as a threshold matter, that the disclaimer met the time requirements of state law. *Keinath* v. *Commissioner, supra,* 480 at 61, 64. There is accordingly no conflict between the decision below and *Keinath*. Whether the timeliness requirement is characterized as "procedural" or "substantive" under Georgia law, the untimely disclaimer was inoperative, and the result for federal estate tax purposes is the same. Under the Minnesota law involved in *Keinath*, the disclaimer was valid and operative.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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